NO. 22386

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN S. AUSTIN,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney

RAYMOND F. ZVETINA,
Assistant U.S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

NO. 22386

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN S. AUSTIN,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney

RAYMOND F. ZVETINA,
Assistant U.S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

(Cases) Page

Statutes

TABLE OF AUTHORITIES (continued)

NO. 22386

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN S. AUSTIN,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellee.

APPELLEE'S BRIEF

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

The Statement of the Facts of The Case as set forth in Appellant's Brief (pp. 3-4) is deemed inadequate as a basis for discussion of the legal issues involved. It omits several significant procedural facts which are essential for a complete understanding of the case in its present posture, and it is characterized by the use of such emotional and almost frenzied terminology as to render it more tract than fact.

The government, therefore, feels compelled to submit its own independent summary of the pertinent procedural facts, as follows:

On April 12, 1967, plaintiff-appellant (hereinafter referred to as plaintiff) filed in the United States District Court for the Southern District

of California a Complaint for Declaratory Judgment, Injunction and Temporary Restraining Order, which sought, in essence, to restrain the United States Navy from separating plaintiff from the service with an undesirable discharge pursuant to the recommendation of an Administrative Discharge Board, which found that plaintiff had been convicted by foreign civil authorities of an offense for which the maximum penalty under the Uniform Code of Military Justice is confinement in excess of one year. Under Naval regulations, such conviction by civil authorities (foreign or domestic) is a basis for an undesirable discharge (Exhibit H to plaintiff's complaint, C-10312).

Stripped of unessentials, the Complaint alleges that the plaintiff is an enlisted man serving on active duty in the United States Navy under an enlistment contract commencing November 27, 1961, and expiring November 27, 1967. On June 19, 1965, he was arrested in Mexico by officers of the Mexican Federal Police, and was subsequently convicted of a narcotic offense and sentenced to four years imprisonment and a 4,000 peso fine.

At oral argument on the Government's Motion to Dismiss [Memorandum of Decision Dismissing the Action, p. 3] it was conceded that plaintiff served sixteen months of the Mexican sentence, paid a fine, appealed, with resultant affirmance of the judgment, and sought executive clemency, which was denied.

On November 15, 1966, an Administrative Discharge Board was convened at the Naval Missile Center, Point Magu, California, which

considered evidence of plaintiff's conviction, heard plaintiff's testimony, and recommended an undesirable discharge by reason of misconduct. [Plaintiff was represented by retained civilian counsel at this proceeding.]

On January 25, 1967, the Chief of Naval Personnel directed plaintiff's Commanding Officer to separate plaintiff from service with an undesirable discharge by reason of misconduct, which direction was ordered held in abeyance pending results of the instant court action.

In addition to the above-distillation of facts, the Complaint alleges numerous irregularities and acts of misconduct by the Mexican police and court which are claimed to be in violation of plaintiff's rights under the Mexican Constitution. Additionally it is charged that plaintiff's arrest was based upon evidence which was "rigged" by agents of the United States Federal Bureau of Narcotics.

Finally, there are allegations of manifold irregularities in the institution, conduct and conclusions of the Administrative Discharge Board.

In response to plaintiff's Complaint the United States, on June 15, 1967, filed a Motion to Dismiss, which, pursuant to a hearing, was granted by the District Court in a Memorandum of Decision Dismissing the Action filed on November 7, 1967.

The District Court dismissal was predicated upon failure of the plaintiff to exhaust his administrative remedies. While recognizing that an undesirable discharge qualifies as irreparable injury, the court determined that there was insufficient likelihood that plaintiff would prevail on the merits to justify judicial short-circuiting of the administrative process.

The instant appeal followed.

The Complaint was filed under 28 U. S. C. §2201 and 2202, 5 U.S.C. §1009, 10 U.S.C. §1162 and 1163, and Articles V and VI of the Constitution of the United States.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon 28 U.S.C. §1291 and 28 U.S.C. §1294.

II.

STATUTES INVOLVED

Title 10, United States Code, Section 1552, reads in part as follows:

"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three

years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be . . . . . .

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under

this section relate.

(e) . . . . . .

(f) . . . . . ."

III.

QUESTIONS PRESENTED

1. Should the plaintiff be required to exhaust his administrative remedies before seeking judicial review of his discharge?

2. Would plaintiff be likely to prevail upon the merits of his claim in the District Court?

3. Can plaintiff's felony conviction by a Mexican Court which had jurisdiction over his person be collaterally attacked?

4. Was plaintiff legally "entrapped" by agents of the Federal Bureau of Narcotics?

IV.

SUMMARY OF ARGUMENT

Exhaustion of administrative remedies is a fundamental principle of the law, predicated upon sound considerations of the separation of powers and judicial conservation of energy. While the principle is not applied with wooden inflexibility, the exceptions are infrequent and require a conjunction of irreparable injury to the plaintiff and a likelihood of success on the merits before the judiciary will intervene.

Plaintiff seeks to avoid an undesirable discharge on the basis of alleged irregularities in his Mexican conviction, entrapment by agents of the Federal Bureau of Narcotics, and errors in the conduct of the Administrative Discharge Board. Insofar as the Mexican conviction is concerned, it is not open to collateral attack in this proceeding. The record establishes that the agents of the Federal Bureau of Narcotics merely presented plaintiff the opportunity for the commission of an offense and there was no legal "entrapment." Errors in the proceedings of the Administrative Discharge Board are properly susceptible to administrative review.

Hence, since the likelihood of plaintiff's success on the merits is not substantial, the instant case is not an appropriate one for dispensing with the customary administrative remedies in favor of judicial intervention.

V.

ARGUMENT

A. JUDICIAL DISPENSATION WITH THE REQUIREMENT OF EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIRES BOTH IRREPARABLE INJURY TO PLAINTIFF AND LIKELIHOOD OF SUCCESS ON THE MERITS.

The principle of exhaustion of administrative remedies before resort to the courts is deeply ingrained in our jurisprudential system. It is based upon sound policies of the separation of powers and conservation of judicial energies. Sohm v. Fowler, 365 F.2d 915, 917 (C.A.D.C., 1966).

Additionally, the judicious application of the principle tends to discourage forum shopping, frequently obviates unnecessary resolution of constitutional issues, promotes uniform and non-sporadic elaboration of administrative regulations, and effectively utilizes specialized administrative knowledge and acquired expertise. Sohm v. Fowler, 365 F.2d 915, 917-919 (C.A.D.C., 1966); Nelson v. Miller, 373 F.2d 474, 479 (C.A. 3, 1967).

While the courts have not applied the principle with procrustean rigidity, departure from the norm requiring exhaustion of administrative remedies is relatively rare.

A significant example of such a departure is found in this Court's decision in Schwartz v. Covington, 341 F.2d 537 (C.A. 9, 1965). There a serviceman sought to enjoin the Army from ordering his discharge under dishonorable conditions. The Court upheld the action of the District Court in granting a stay of the discharge pending exhaustion of military remedies and, if necessary, District Court review. The ruling was predicated upon the coexistence of two factors: (1) irreparable harm to plaintiff by virtue of a dishonorable discharge if the stay was not granted, and (2) the likelihood that plaintiff would prevail upon the merits of his appeal to the District Court (insubstantial evidence of homosexual activity).

It is clear from the Schwartz case that this Court sanctioned only a limited departure from the exhaustion requirement (although the discharge was stayed, completion of review by the Army Board of Correction of Military Records before court review was specifically contemplated), and then only upon a showing of "special circumstances," as this Court's criteria

have come to be known. See Sohm v. Fowler, 365 F.2d 915 (C.A.D.C. 1966).

While there has been some variation in the approach of the circuits to the role of the District Court in discharge cases prior to exhaustion of post-discharge administrative review, Nelson v. Miller, 373 F.2d 474, 478-479 (C.A. 3, 1957), no case has been found sanctioning immediate district court review on the merits under these circumstances, or even suggesting its propriety, absent irreparable harm and a patently meritorious claim.

It is therefore apparent, under the Schwartz test, that if an adequate post-discharge administrative remedy is available to plaintiff, he is required to pursue that remedy before obtaining judicial review, unless he can establish both irreparable harm and the likelihood of prevailing on the merits in the District Court.

The existence and adequacy of review by the Board for Correction of Naval Records, 10 U.S.C. §1552, 32 C.F.R. §723 et. seq., is admirably detailed in Nelson v. Miller, 373 F.2d 474, 478-479 (C.A. 3, 1967). In brief, the Board has authority to review military records to correct error or injustice, and to recommend restoration of rate with back pay. Quite evidently, the remedy is not a futile one.

Insofar as the requirement of irreparable harm is concerned, the District Court, with some degree of skepticism, conceded arguendo that the test was met by virtue of plaintiff's impending dishonorable discharge.

[Memorandum of Decision Dismissing the Action, p. 3]. The government similarly, for purposes of this appeal, concedes the element of irreparable damage.

What is not conceded, however, and what distinguishes the instant case from Schwartz v. Covington, 341 F.2d 537 (C.A. 9, 1965), upon which plaintiff relies so heavily, is the element of patent merit, or likelihood of success of plaintiff's claim. As will be developed more fully under the next argument heading, it is the respectful contention of the government that there is an insufficiant likelihood that plaintiff will prevail in his collateral attack upon his Mexican conviction to justify judicial intervention before the administrative process has run its full course.

Additionally, as was the case in Sohm v. Fowler, 365 F.2d 915 (C.A.D.C. 1966) and Nelson v. Miller, 373 F.2d 474 (C.A. 3, 1967), many of the claims advanced by plaintiff deal with interpretation of Naval regulations, or relate to procedures of the Administrative Discharge Board, the primary authority for the interpretation of which lies within the Navy's own appellate system. Also, deference to Naval administrative authorities in this case comports with the basic policy of avoiding the unnecessary resolution of constitutional questions. These considerations in addition to those previously advanced, militate in favor of the District Court's disinclination to short-circuit the administrative process.

B. THE PLAINTIFF IS UNLIKELY TO PREVAIL UPON THE MERITS OF HIS ATTACK ON HIS MEXICAN FELONY CONVICTION AND ALLEGED "RIGGING" OF EVIDENCE BY UNITED STATES AGENTS.

1. PLAINTIFF WAS NOT LEGALLY ENTRAPPED.

Plaintiff's conclusory allegation in paragraph VII of the Complaint that his arrest was procured upon evidence "rigged" by members of the Federal Bureau of Narcotics is repeated without elaboration in his brief at page 3. In support of this charge, there is attached to the Complaint, as Exhibit B, the report of Federal Narcotics Agent Harry J. Watson, which sets forth in some detail the background and circumstances of plaintiff's arrest. In essence they are as follows:

In the latter partof 1963 the Federal Bureau of Narcotics received information that plaintiff was the contact man for a ring of Canadian-Mexican heroin smugglers. Plaintiff indicated to a state undercover agent his willingness to arrange for the purchase of heroin in Tijuana, Mexico, and similarly to undercover agent Watson.

On June 18, 1965, plaintiff travelled to Tijuana with Agent Watson for the purpose of procuring six to eight ounces of heroin from plaintiff's contact. His conversation indicated both a familiarity with the narcotics trade and a prior course of narcotics dealing.

After unusccessful efforts to locate his contact, plaintiff introduced the agent to the contact's partner, giving assurances that the agent could be

trusted.

That evening plaintiff stayed in a motel in Tijuana while the agent purported to return to San Diego. The following morning plaintiff advised Agent Watson that his contact had arrived and would return to the motel at 11:30 a.m. After some unsuccessful efforts to arrange for delivery of the heroin, plaintiff, his contact (Isaac Eduardo Duarte), and the agent returned to the motel to await delivery. While waiting, Duarte told the Agent in plaintiff's presence that he had had many business dealings with plaintiff, and each time the heroin was good and was paid for promptly. At 5:00 p.m. Duarte left the room and returned in one half hour, whereupon he delivered the heroin to Agent Watson in plaintiff's presence. The arrest followed. At the time of the arrest plaintiff held four ounces of heroin in his hand.

It is clear from the foregoing recitation that the appellation "rigged", in the sense of legal entrapment, is grossly inapposite to the facts. It is fundamental that entrapment is not made out unless the accused was induced to commit the offense solely because of the urgings and blandishments of the government agents.

Sherman v. United States, 356 U.S. 369 (1958).

Where the accused has the predisposition to commit the offense, and the agents merely provide the opportunity for its commission, there is no entrapment.

Sorrells v. United States, 287 U.S. 435-441 (1932);

Robinson v. United States, 379 F.2d 338 (C.A. 9, 1967).

As the facts clearly demonstrate, the plaintiff manifested a ready willingness to deal in narcotics, a familiarity with the jargon and mechanics of the trade, and prior active participation in similar narcotic dealings. Such is not the stuff of which entrapment is fashioned.

The District Court properly concluded, therefore, that the plaintiff's allegations respecting "rigged" evidence, even if true, would afford no ground for relief. [Memorandum of Decision Dismissing the Action, p. 5].

2. PLAINTIFF'S MEXICAN CONVICTION IS NOT SUBJECT TO COLLATERAL ATTACK.

In an argument bristling with colorful invective, but notably unencumbered by a single citation of authority, plaintiff declares his Mexican conviction invalid. [Appellant's Brief, pp. 7-8]. Nowhere, however, either in the Complaint or in his brief does plaintiff allege or even suggest that the court which tried him lacked jurisdiction of the subject matter or of the person of plaintiff. While the vehemence of plaintiff's denunciation of the rape of the goddess of justice perpetrated by Mexican courts is substantial, and his equation of Mexican justice with that of North Viet Nam and Nazi Germany interesting, such a metaphorical approach to serious questions of conflicts of laws is hardly informative.

The government respectfully submits that neither the District Court nor the Administrative Discharge Board was required to entertain a collateral

attack upon plaintiff's Mexican conviction.

While the law in this area is by no means crystal clear, the general rule seems to be that foreign judgments in personam (including criminal convictions) will be regarded as conclusive if decided upon the merits by a foreign court having jurisdiction of the parties and subject matter. 50 C. J.S. §904-906;

Spann v. Compania Mexicana Radiodifusora Fronteriza, S.A., 41 F. Supp. 907 (N.D. Tex. 1941), aff'd., 131 F.2d 609 (C.A. 5, 1942). See also Indian Refining Co. v. Valvoline Oil Co., 75 F.2d 797 (C.A. 7, 1935) and Ingenohl v. Olsen and Co., 273 U.S. 541 (1927).

The Supreme Court in 1895 discussed the concept of "comity" upon which a form of "full faith and credit" to a foreign judgment may be given in Hilton v. Guyot, 159 U.S. 113, and while holding under the particular facts that a French judgment need not be accorded credit where there was no reciprocity by French Courts, the Court pointed out [pp. 202-203] that differences in the procedures of the foreign court and in the method of examining witnesses and the admissability of evidence were not grounds for failure to recognize the validity of the judgment.

There is also a notable reluctance on the part of the courts to permit retrial of or collateral attack upon criminal convictions which form the basis of administrative action. See Giammario v. Hurney, 311 F.2d 285 (C.A. 3, 1962); Ng Sui Wing v. United States, 46 F.2d 775 (C.A. 7, 1931).

Neither the Administrative Review Board, nor the District Court, (nor, for that matter, this Court), is equipped to sit in review of the actions

of a foreign court proceeding within its own jurisdiction. Unlike the laws of sister states, developed along roughly parallel lines in the common-law tradition, the laws of foreign states are difficult to ascertain, being written in a foreign tongue and developed in unfamiliar ways, and are not easily accessible. An administrative board or court, venturing into the thicket of quasi-appellate review of a foreign criminal conviction, would inevitably lose its way. Nor can we adopt the simple expedient of superimposing American concepts of justice upon the foreign proceedings, for such an approach would deny the validity of any law but our own (a degree of legal vanity we have never yielded to) and would be practically unworkable.

It was presumably for these reasons that the District Court, perhaps cavalierly, yet rightly, brushed aside plaintiff's attack on his conviction with the cursory remark that , "It is unlikely that the Appellate Court would interest itself in Mexican procedures carried on under Mexican law." [Memorandum of Decision Dismissing Action, p. 4].

VI.

CONCLUSION

For the reasons presented herein and apparent on the record, it is respectfully submitted that the judgment of the District Court be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney

RAYMOND F. ZVETINA,
Assistant U.S. Attorney

Attorneys for Appellee
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Raymond F. Zvetina

RAYMOND F. ZVETINA